SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-735

INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, *Petitioner,*

v.

DOW CHEMICAL COMPANY, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITIONER'S REPLY MEMORANDUM

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Upon receipt of Respondent's brief in opposition which disputes various assertions of fact contained in the petition for certiorari the Court of Appeals for the Fifth Circuit was requested to certify and trans-

mit to this Court the two-volume appendix and supplementary appendix which comprised the record before it as well as the petition for rehearing which was denied on August 7, 1973.[1]

Respondent's brief in opposition is designed to create issues of fact that are non-existent and for the purpose of diverting the Court from the compelling legal issues presented by the writ. In addition Respondent would have this Court conclude that these issues were not presented below simply because there is no discussion or determination thereof in the underlying decisions.

Each of the three questions constituting the basis for the requested writ were repeatedly presented to the District and Circuit Court. A cursory examination of the Petition for Rehearing[2] will demonstrate that the awarding of strike damages for the period prior to commencement of the January strike (Pet. for Reh'g p. 2) as well as each of the three questions presented by the writ (Pet. for Reh'g pp. 2-4; 8-9) were specifically presented and argued on appeal from the District Court's decision. The failure of the lower courts to

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[1] The designation "R" followed by a number refers to said appendix or record below and the designation "Pet. for Reh'g" followed by a number refers to the rehearing petition denied by the Court of Appeals. The designation "Br." followed by a number refers to the brief in opposition and the designation "Pet." followed by a number refers to the petition herein for a writ of certiorari.

[2] The Petition for Rehearing (pp. 5-6) also called the Circuit Court's attention to the fact that its affirmance of the District Court's findings was the uncritical acceptance of Respondent's proposed findings that were Xeroxed and adopted verbatim by the District Court Judge and that it was therefore error to have applied the "clearly erroneous rule" in its review of the damage award.

consider or decide these important legal issues (Pet. pp. 3a; 25a-26a; 29a) cannot operate to deprive Petitioner from having them determined by this Court. The judicially unexplicated award of strike damages in this case may not camouflage the fact that their payment will infringe upon an area of labor combat that Congress specifically designed to be free and unobstructed, i.e., exculpating unions from the damage consequences of lawful strike activity. Sections 7 and 13 of the Labor-Management Relations Act establish an absolute right to engage in lawful strikes and the award of damages over a period of time that included such lawful strike activity can only be deemed judicial infringement thereof.

We shall now put to rest the claim that the statement of the case in the within petition for certiorari is either unsupported by the certified record below or in any other way inaccurate.

Respondent denies (Br. p. 3) that damages were awarded prior to the time when Petitioner's unlawful 27-day strike began on January 7, 1965, and at the same time concedes that damages were calculated and awarded by the District Court on a calendar or monthly basis which encompassed the entire first half of 1965 as the "unlawful strike-affected period" (Br. pp. 6-8). The damage award of $297,607 (Pet. 3a) is based upon Respondent's calculation set forth in its Exhibit 28 as Case III (R. p. 112; Pet. pp. 29a-30a) which included all of its excess production costs as well as its unabsorbed fixed costs for the month of January notwithstanding that the unlawful strike did not commence until January 7, 1965 (Pet. pp. 16a, 31a).

With respect to the Respondent's claim that the lower court expressly eliminated damages resulting from the 45-day lawful strike between March 15 and April 29, 1965 (Br. p. 4), Case III of the damage calculation (R. p. 112; Pet. pp. 29a-30a) shows that all losses (excess production costs and unabsorbed fixed costs) for the months of March and June were included. The so-called "adjustment" for the lawful 45-day is explained in Case III (R. p. 112) as increasing the amount of pounds produced during April and May by some 169,291. The spurious and illusory nature of this poundage adjustment, which amounts to about 25% of the total (687,109 pounds—see Case I, R. p. 109) actually produced over the entire 6-month period is that it reduced the amount ($161,431) of excess production cost awarded by $246 or less than 1%. (Case I, R. p. 109, on the basis of 687,109 pounds equals $161,676 of excess production costs and Case III, R. p. 112, on the basis of 856,400 pounds equals $161,431 of excess production costs.)

With respect to the claim that the 45-day lawful strike was ineffective because it failed to secure its collective bargaining objective (Br. p. 6) this assertion is not in accord with the record below which shows that this second strike most seriously affected plant operations (R. p. 237, pp. 241-242) and that it was not until July or later 1965 that the plant was able to get back to normal production (R. p. 221). Production costs as well as operating losses during the month of April reached a record all-time high (R. p. 138, Exhibit 19; pp. 138-142, Exhibits 19-21). Respondent's operating loss of $44,591 for the month of January increased in March to $53,129 and then reached $67,041 in April (R. p. 138, Exhibit 19). A comparison of the variable

costs and operating losses during the two strike periods shows:

1965	Variable Costs of Production (R. p. 142, Exhibit 21)	Operating Loss (R. p. 138, Exhibit 1a)
January	$.548 per pound	$44,591
March	$.597 per pound	$53,129
April	$.718 per pound	$67,041

Respondent operated with one-third less personnel because of the lawful strike (R. p. 90, Pet. p. 26a) and those who worked were new and inexperienced employees (Pet. p. 24a).

Independent of the damage impetus of the lawful second strike the supervening legal issue presented thereby is the combining of actionable and non-actionable strike losses so as to penalize the Union and the employees it represented because they exercised their federally protected and unqualified right to go out on strike after the labor agreement had expired. The requested writ specifically places before the Court the important legal issue of whether any damages whatsoever are recoverable for the period following the calling of the lawful 45-day strike on March 15, 1965.

Reason Two for granting the requested writ is whether damages for the 27-day (unlawful) strike may include all of Respondent's incurred overhead, i.e. fixed costs, for a period of 6 months even though Respondent operated its plant and realized a return from productive labor throughout this period. We agree with Respondent (Br. pp. 22-24) that an employer suffers overhead damage when the number of units decrease

because of a strike. However, Respondent failed to add—as has every court that previously considered this issue of damage (Pet. p. 11)—recoverable overhead must be that portion or percentage for which it recovers no return in productive labor (e.g., *United Electrical Workers* v. *Oliver Corp.*, 205 F. 2d 376, 387, 8th Cir., 1953). In this case the court below granted 100% of the fixed overhead expense during the month of January, the period of the unlawful 27-day strike, without regard to the amount of production (some 82,061 pounds, R. pp. 109, 112) that was obtained. In addition, the court below awarded 100% of the fixed overhead expense for the following 5 months even though there was no unlawful withholding of labor throughout that period and the plant continued to operate and produce income. The award of overhead expense for that 5-month period is not simply an error as to the measure of strike damage. It constitutes judicial infringement of the strike right exercised by the Union when it went out on a 45-day lawful strike following the expiration of the labor agreement.

The loss figures of $119,344 for the months of January, February and half of March 1965 appear in Exhibit 31 (R. p. 114) which Respondent prepared and introduced into evidence as "a calculation of damages attributable solely to the unlawful [first] strike." (Br. p. 7. If these losses are a "gross misrepresentation" (Br. pp. 12-13) then it is by Respondent who submitted Exhibit 31 to the District Court. We have shown that the purported adjustments in the damage calculation accepted by the court below (Pet. pp. 29a; R. p. 112, Case III of Exhibit 28) for the lawful 45-day strike were so minimal and irrationally conceived as to allow the Company to effectively recover damages for the

Union's total strike activity, i.e., for the periods of the unlawful first strike and the lawful second strike. Respondent's Exhibit 31 (R. p. 114) is therefore the only untainted statement of losses, as distinguished from proven losses (R. pp. 440, 469, 470), that is in evidence concerning the January strike.

Respondent's claims that the failure of the District Court to properly separate damages attributable to the two strikes is "a classic example of a problem which is merely episodic and a quarrel which is of no importance to anyone but the parties" (Br. p. 15). This claim, we submit, fails to recognize that the second strike was protected and authorized by Sections 7 and 13 of the Labor-Management Relations Act and that the legitimate use of the strike weapon cannot be subject to judicial interference since it can only operate to the detriment of the federal labor policy which recognizes that economic weapons by either an employer or union are an intrinsic part of our free collective bargaining system. To penalize instead of exculpating this or any other union from the damage consequences of a lawful strike can only be fundamentally destructive of that system and requires reversal of decision and judgment of the United States Court of Appeals.

Respectfully submitted,

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January 14, 1974